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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of: )  
)  
Petitions Regarding DirecTV's DBS ) MB Docket No. 03-82  
Service to the States of Alaska and Hawaii ) IB Docket No. 98-21  
)  
)

**REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION**

EchoStar Satellite Corporation ("EchoStar") hereby submits its reply comments in the above-captioned proceeding. EchoStar has invested considerable capital, time, and effort to bring the best possible DBS service to the people of Alaska and Hawaii and believes that the outcome of this proceeding can have a direct impact on the quality of MVPD service in these states. Although we have not been a party in this proceeding to date, the comments of DirecTV and the State of Hawaii directly referred to EchoStar and EchoStar's service. Therefore, in the interest of an accurate and complete record, we believe that EchoStar should speak for itself.

The geographic service rule at issue in the State of Hawaii's petition calls for DBS operators to provide service that is "reasonably comparable" to service in the contiguous 48 states.<sup>1</sup> The differences between EchoStar's and DirecTV's service in Hawaii starkly establish DirecTV's failure to meet this standard.

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<sup>1</sup> Policies and Rules for the Direct Broadcast Satellite Service, Report and Order, IB Docket No. 98-21 (rel. June 13, 2002) ("DBS Rules Order"), at para. 72; 47 C.F.R. 25.148(c).

EchoStar offers service that is significantly more comparable to its service in the contiguous 48 states than does DirecTV. Specifically, EchoStar's Dish Network offers Hawaii's consumers *America's Top 50* and *America's Top 100* programming packages, in addition to multiple premium programming choices.<sup>2</sup> *America's Top 50* is an exceptionally well priced package that includes entertainment, sports, news and children's programming. *America's Top 100* is our most popular programming package. EchoStar offers these same packages in the contiguous 48 states. In other words, with respect to some of our most popular programming services, EchoStar's Hawaii offering is the same as that in the contiguous 48 states. By contrast, DirecTV offers packages specifically tailored to Hawaii that do not include the same products offered in some of its most popular programming packages available in the continental U.S.<sup>3</sup>

Construction of satellites enabling EchoStar to provide expansive programming services to consumers in Alaska and Hawaii was expensive, and does not represent the best return on invested capital that would otherwise be available to EchoStar. However, EchoStar made the commitment to offer these services in Alaska and Hawaii. By contrast, DirecTV has chosen to ignore its obligations in clear violation of Commission rules. This provides a competitive advantage to DirecTV over EchoStar in two respects. First, by ignoring its obligation to Alaska and Hawaii while EchoStar meets its commitment, DirecTV is able to provide more programming with a stronger signal to consumers in the contiguous 48 states than would otherwise be possible if DirecTV fulfilled its obligations. Second, by violating Commission rules, DirecTV is able to achieve a higher return on invested capital than can EchoStar, which

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<sup>2</sup> See <http://www.dishnetwork.com/content/programming/packages/hawaii/index.shtml> (visited May 9, 2003).

<sup>3</sup> DirecTV comments at 8.

spent funds in satisfaction of its commitment to Alaska and Hawaii. DirecTV should not be permitted to ignore its obligations to Alaska and Hawaii and gain a competitive advantage over EchoStar in the contiguous 48 states by violating Commission rules.<sup>4</sup>

Moreover, unlike DirecTV, EchoStar has exceeded its legal obligation to establish reasonably comparable service to Alaska and Hawaii by providing spot-beam coverage over both states, something we have not yet been able to provide to all of the contiguous 48 states. Such spot beam coverage allows us to provide local broadcast service to cities like Honolulu and Anchorage, thereby bringing true competition to incumbent cable operators and the resulting price and quality competition that benefits DBS and non-DBS subscribers alike. The two spot beams covering Alaska and Hawaii represent a significant investment by EchoStar. EchoStar VII and VIII together cost roughly a half a billion dollars. Generally, spectrum scarcity and re-use constraints mean that any spot beam devoted to one region leaves another region less likely to be covered by a spot beam. Once established, spot beams are fixed and cannot be moved. Therefore, EchoStar's spot beams over Alaska and Hawaii were built at considerable capital and opportunity cost. They offer further tangible evidence of the degree to which EchoStar is committed to provide not just comparable, but in some respects superior service to Alaska and Hawaii.

At the very least, the Commission should conclude that DirecTV's service in Hawaii does not meet the "reasonably comparable" standard. The Commission could end its analysis there.

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<sup>4</sup> Of course, EchoStar's entire suite of products differs between the contiguous 48 states, Alaska, and Hawaii and we do not hereby argue that services throughout all 50 states should be identical. The geographic service rule does not call for this. Rather, it requires "reasonably comparable" service for the people of Alaska and Hawaii. EchoStar's service meets this standard.

DirecTV's argument assumes that the next question posed by the rule is whether DirecTV's failure to provide reasonably comparable service to the State of Hawaii is permissible due to technological infeasibility or economic unreasonableness.<sup>5</sup> The rule, however, is not worded that way. Instead, the rule states that these exceptions only apply to "applicants" who currently do not provide service to Alaska and Hawaii.<sup>6</sup> DirecTV is not an applicant and it currently does serve – albeit insufficiently – the states of Alaska and Hawaii. Therefore, there is a substantial question as to whether the exceptions to which DirecTV refers are applicable here at all. If not, DirecTV clearly has failed the "reasonably comparable" standard and should be subject to Commission remedies.

Even if the exceptions apply, however, DirecTV does not qualify for them. Regarding technical infeasibility, the facts speak for themselves. It is by definition technically feasible to provide comparable service to Hawaii if EchoStar is doing so today. DirecTV effectively concedes this point.<sup>7</sup>

The crux of DirecTV's argument is that its pending litigation with NRTC makes any improvement to its Hawaiian service economically unreasonable under the geographic service rule. Not so. The "economics" to which the rule refers are not the potential, unrealized, and unquantifiable litigation risk cited by DirecTV. Rather, they are the costs attributable to

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<sup>5</sup> 47 C.F.R. 148(c) ("DBS applicants seeking to operate from locations other than 61.5 W.L. who do not provide service to Alaska and Hawaii, must provide technical analyses to the Commission demonstrating that such service is not feasible as a technical matter, or that while technically feasible such services would require so many compromises in satellite design and operation as to make it economically unreasonable.").

<sup>6</sup> Id.

<sup>7</sup> DirecTV comments at 12 ("DirecTV does not dispute that it has the technical capability" to move certain programming to satellites better able to serve Hawaii).

“compromises in satellite design and operation.”<sup>8</sup> In establishing this exception, the Commission could have described economic costs generally but it did not. It instead focused on one type of cost – satellite design and operation – as the kind of prohibitive expense that would allow a satellite operator to fail to provide reasonably comparable service. In fact, the rule even suggests that some satellite and operation costs due to improved service to Alaska and Hawaii would not be enough to invoke the exception. Only when “so many” such expenditures are required may a satellite operator be permitted to fail the geographic service standard.

Here, DirecTV does not cite any “satellite design and operation” costs in its economic analysis. As stated above, it concedes that it has the ability today to better serve Alaska and Hawaii using its existing satellite fleet. Rather, it refers to “imminent” litigation with NRTC that “creates a risk” for DirecTV, namely “new threats and accusations” by NRTC that “could” create “substantial economic exposure” for DirecTV.<sup>9</sup> This is hardly a case for economic unreasonableness. The economic costs on which DirecTV pins its hopes for a favorable Commission decision are too far removed from the category of costs to which the exception applies and too ephemeral to qualify under the exception.

EchoStar suggests that the Commission simply require DirecTV to do precisely what EchoStar did: move core programming from older satellites less capable of serving Alaska and Hawaii to newer ones that can optimize service to those two states. Beginning several years ago, EchoStar moved much of our core programming at the 119° W.L. orbital location from the

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<sup>8</sup> 47 C.F.R. 148(c) (the exception applies if there are “so many compromises in satellite design and operation as to make it economically unreasonable” to provide reasonably comparable service).

<sup>9</sup> DirecTV comments at 12-14.

EchoStar I and II satellites to the newer and more technologically advanced EchoStar V, VI, and VII.<sup>10</sup>

DirecTV concedes that it could enhance its service to Hawaii by moving certain programming at the 101 W.L orbital location “from DirecTV 2 to DirecTV 1R.”<sup>11</sup> Its claims of economic unreasonableness are without merit. The Commission could vastly improve DBS service and MVPD competition in Hawaii by requiring DirecTV at the very least to take the same actions EchoStar has taken to improve service.

Alternatively, if it wishes to avoid the NRTC litigation issue, the Commission should require DirecTV to simulcast core programming at the 119° W.L. orbital location while leaving existing core programming at its current location. Rather than devoting capacity to the introduction of new services and local service in new markets, DirecTV could devote some of its existing capacity at 119° W.L. to the provision of core programming in demand on Hawaii.

Finally, the Commission should condition the launch of DirecTV 7S on improved service to Alaska and Hawaii. DirecTV’s new spot beam satellite supposedly will bring improved service to multiple communities in the contiguous 48 states. Hawaii and Alaska likewise should reap some benefit from the launch of this satellite, if not as a direct result of the new technology, then as a result of service-related conditions imposed by the Commission.

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<sup>10</sup> In addition, these newer satellites are designed with full-CONUS beam patterns that place enough energy over Alaska and Hawaii to provide reasonably comparable service to those states. This represents a design, operation, and opportunity cost to EchoStar. (It should be noted that core programming also went to EchoStar IV, but this satellite today is operating less than optimally).

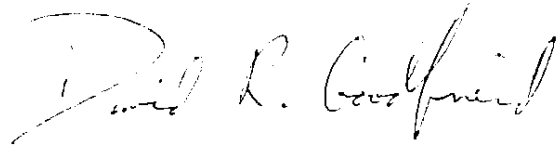
<sup>11</sup> DirecTV comments at 12.

Anything less than a robust Commission remedy in this proceeding would set a dangerous double standard under the geographic service rules.

### **CONCLUSION**

For the reasons set forth above, the Commission should rule that DirecTV has failed the "reasonably comparable" standard of the geographic service rule with respect to Hawaii, does not qualify for the "economically unreasonable" exception under that rule, and therefore should be required immediately to move core programming to satellites better able to provide service to Hawaii.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David R. Goodfriend". The signature is fluid and cursive, with the first name "David" being particularly prominent.

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